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No. 09-195

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAN REUST,

Petitioner,

v.

THE STATE OF ALASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITIONER'S REPLY BRIEF

For Petitioner

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A. Review of the Alaska Supreme Court's decision is necessary to resolve a conflict.

In his Petition for Writ of Certiorari, Dan Reust ("Reust") asks this Court to review the Alaska Supreme Court's decision that upheld the taking of a portion of his property interest in a civil recovery because it violated the Takings Clause of the Fifth Amendment to the United States Constitution. (Pet. 6). Alternatively, Reust argues that, as applied in his case, AS 09.17.020 violated the Due Process Clause of the Fourteenth Amendment. (Pet. 13). Reust contends review is warranted because the Alaska Supreme Court's decision conflicts with a decision from the Ninth Circuit Court of Appeals and it conflicts with other State Supreme Court and Federal Court decisions. (Pet. 7-12).

Respondent argues review of the first question presented is not warranted because there is no conflict of authority. (Respondent's Brief in Opposition 4-9 ("Opp.")). Regarding the as applied, Due Process question, Respondent says review is not warranted because Reust had no federal interest at stake and the issue is merely one of statutory construction. (Opp. 12-13). Respondent also contends there is no issue presented that has national importance. (Opp. 4-9).

Contrary to Respondent's position, the lower courts are in disarray on the issues this Court is being asked to review. The conflict is real and the cases cited by Petitioner truly address the same issue

and reach different conclusions or similar conclusions through a different application or interpretation of the law as to what constitutes property, when the interest in property arises and whether the State may take that interest through a Statute enacted by a State Legislature. (Pet. 8-9). Contrary to Respondent's assertion, the Statutes from Alaska and Colorado were substantially similar, and Colorado held there was an unconstitutional taking of a property interest while Alaska did not find a constitutional violation. (*Compare* App. 67-71 *and* App. 72-74); (App. 52-54 *and Kirk v. Denver Publishing Co.*, 818 P.2d 261 (Colo. 1991)). Additionally, Alaska's decision is in conflict with the Court of Appeals for the Ninth Circuit with regard to what constitutes a property interest and when that interest attaches. (Pet. 10).

The Alaska Supreme Court held and Respondent admits (Opp. 6-8) that the State's right vested on return of the jury verdict. (App. 5-6). The Alaska Court erred, however, when it concluded that Petitioner's property interest was not vested before the State's right was vested. (App. 52-54). The Alaska Supreme Court made an effort to distinguish Alaska from Colorado by noting subtle differences between the Colorado Statute and the Alaska Statute. (App. 5-6; 52-54). Respondent seizes upon these subtle differences to oppose review. (Opp. 6-8). However, if Petitioner had a cognizable interest in his cause of action, that is protected by the Takings Clause, the subtle differences between Alaska's, Colorado's and Utah's split-recovery Statutes is of little import. (Opp. 6-8).

The Alaska Court concluded that Alaska's Statute applied immediately upon an award by the jury. (App. 5-6; 52-54). In contrast, said Alaska, Colorado's Statute only applied after entry of a judgment and therefore after *Kirk's* interest vested which resulted in a taking. *Id.* These subtle differences between *Reust* and *Kirk* do not undermine the fact that a conflict exists. A conflict exists because Petitioner's property interest in the settlement proceeds attached when his cause of action accrued and thus his interest attached before Respondent's interest because there was no award or judgment. Under the reasoning applied in *Kirk* and in *Smith v. Price Development Co.*, 125 P.3d 945 (Utah 2005), Petitioner was subjected to an unconstitutional taking. Utah had it right when it found that Alaska's interpretation and application of applicable law as "anomalous." *Price*, 125 P.3d at 952 fn.6.

Alaska's interpretation is anomalous because AS 09.17.020(j) does not give the State the right to entry of a judgment in its favor to recover punitive damages. Nor, does the Statute give the State the right to intervene in the action to recover punitive damages. (App. 70). Rather, the Statute requires the entry of an order by the Court directing that 50 percent of the award be deposited into the State's general fund but a deposit cannot be made until the money is actually collected. *Id.* Money cannot be collected without a judgment and, in most cases, without additional execution procedures being employed by the successful plaintiff. Clearly, as in *Kirk* the State

does not actually take possession of the funds until the successful plaintiff collects those funds, and as in *Price* the State only collects when the judgment is actually paid. The Alaska Supreme Court's and the Respondent's reliance on subtle differences in the various Statutes does not change the fact that a conflict of authority exists.

The right to have one's property protected by the Takings Clause of the Fifth Amendment should not be dependent upon semantics and subtle differences in Statutes or Regulations. Property should be guarded against governmental taking without just compensation whether the State's right to take property arises as a result of a jury verdict, or the ministerial act of reducing a jury verdict to a final judgment. Regardless of the wording of a particular statute, property is taken only when the judgment is actually paid. Entry of judgment merely serves as a memorial of the jury's decision. More importantly, the State should not be allowed to violate the Takings Clause of the Fifth Amendment by the Legislature's choice of words; instead the question whether an unlawful taking has occurred should depend upon the facts and the actual effect of the Statute in question. Clearly, the subtle differences between Oregon's, Utah's, Alaska's and Colorado's split-recovery provisions do not eliminate the conflict between the States and between Alaska and the Ninth Circuit Court of Appeals.

B. The second question does involve a federally protected interest.

In the second question presented in the Petition for Writ of Certiorari, Petitioner contends that as applied to him, the taking of his property was in violation of Due Process because the Statute did not give the State the right to take part of a civil settlement prior to entry of a judgment. (Pet. 13). Respondent erroneously contends no federal question is raised. (Opp. 12-13). Respondent makes this assertion notwithstanding the fact that the Alaska Supreme Court recognized the federal question. (App. 9, fn.17).

The Fifth Amendment of the Constitution, made applicable to the states by the Fourteenth Amendment, provides that no person "shall be deprived of . . . property, without due process of law." Petitioner contends he was deprived of property, his settlement proceeds, without Due Process. (Pet. 13). Thus, federally protected rights are at issue.

Challenges to State Statutes for a violation of Due Process also raise federal questions that are subject to review by this Court. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 476 (1985) (using as-applied review to invalidate a city ordinance that classified mentally retarded persons); *Troxel v. Granville*, 530 U.S. 57 (2000) (successful "as applied" challenge where Washington State Court applied State Statute incorrectly and violated constitutional rights in the process).

Petitioner has raised a federal question because he contends his private property was taken without just compensation and without Due Process. (Pet. 13). The State is wrong to contend that no federally protected interest is at issue in the second question. (Opp. 12-13).

C. The issues presented are of national importance.

Property rights are one of the cornerstones of individual liberty. *James W. Ely, Jr., Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (1997). That being so, this case presents questions of national importance, namely, the extent to which government can deprive an individual of property without paying just compensation for the taking of that property interest.

Here, Respondent admits that it took a portion of Petitioner's property interest, but it did not compensate Petitioner for the taking of that interest. Placing limits on a government's right to take property without compensating the individual for the taking is clearly important because it involves a matter of significant constitutional, legal, and practical importance that puts a vital liberty interest at stake. Specifically, this Court should grant certiorari to confirm that the government cannot abrogate property rights without compensating for the individual deprived of those rights.

The national import of this case is also evidenced by the fact that it is a recurring issue. Indeed, Respondent recognizes that the issues raised in this case are recurring ones. (Opp. 4), *see Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985 (9th Cir. 2007),[1] *cert. granted in part and denied in part* 128 S.Ct. 977 (2008) *and aff'd* 128 S.Ct. 2146 (2008). The amicus briefs filed in support of the *Engquist* petition clearly show national importance, and several states have already adopted split-recovery statutes that allow the State to take a portion of a civil recovery. (Pet. 7, *citing 35 St. Mary's L.J. 207, 208* (St. Mary's University of San Antonio 2003)). Other States are considering such provisions and some of the States are considering amendments to established provisions. With the current downturn in the U.S. economy and with States looking for more ways to increase revenues, it would be beneficial to resolve this recurring issue and resolution would have national impact by defining property rights and the manner in which those rights may be abrogated by State Legislatures.

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[1] Notably, Oregon's split-recovery statute is currently being tested in a case substantially similar to the facts of this case. *Patton v. Target Corp.*, 2009 U.S. App. LEXIS 19702 (9th Cir. Or. Sept. 2, 2009). In *Patton* the case settled after the jury verdict, but before entry of judgment and the question presented is whether the State of Oregon is entitled to its share of punitive damages awarded by the jury. The Court of Appeals for the Ninth Circuit has certified that question to the Oregon Supreme Court. *Id.*

Settlement of cases and enforcement of settlement agreements is also an issue of national importance. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. Cal. 1989). Settlement of cases is encouraged by the Courts and it clears a crowded court docket and is becoming a more and more important aspect of civil case resolution procedures. It has become so important to the judicial process that Settlement conferences are incorporated by rule into pretrial conferences. USCS Fed Rules Civ Proc R 16(c).

CONCLUSION

There is clearly a conflict between the different States and a conflict between certain State Courts and the Federal Court's on the questions presented in the Petition. The issues are recurring ones and recurrence highlights both the conflict and the importance of rights at issue. The issues here have national importance and fit squarely within the reasons for granting a Writ of Certiorari under this USCS Supreme Ct R 10.

Respectfully submitted this 29th day of September 2009.

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